

MONDAY, 15 OCTOBER 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Paper No. 457 - Application on behalf of the Prosecution under Rule 6(b)(1) pertaining to IPS Document Nos 487, 1112, 2339 and 2611.

Paper No. 467 - Request by Prosecution for production of witnesses and documents.

Paper No. 469 - Application for leave to have the evidence in chief of Joseph W. Ballantine, a witness for the Prosecution, presented in the form of a prepared statement instead of by oral examination.

Paper No. 470 - Application of Prosecution to withdraw motion and vacate order for issuance of a subpoena directed to SCAP requesting deposit of YAMASHITA and HOMMA cases with Clerk of this Court.

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Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:

Sam Goldberg
Court Reporter, IMTFE

Appearances:

FOR THE PROSECUTION SECTION:

MR. JOSEPH B. KEENAN, Chief of
Counsel, acting on behalf
of the United States of
America.

MR. W. C. F. BORGERHOFF MULDER,
Justice, Associate Counsel,
acting on behalf of the
Kingdom of the Netherlands.

MR. CARLISLE W. HIGGINS

MR. GROVER C. HARDIN

MR. SOLIS HORWITZ

MR. LAVERGE

FOR THE DEFENSE SECTION:

MR. WILLIAM LOGAN, JR., Counsel
for the Accused KIDO, Koichi.

MR. MICHAEL LEVIN, Counsel for the
Accused SUZUKI, Teiichi.

MR. GEORGE F. BLEWETT, Counsel for
the Accused TOJO, Hideki.

FOR THE OFFICE OF THE GENERAL SECRETARY, IMTFE:

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat.

MR. CHARLES A. MANTZ, Clerk of the Court

MR. HERBERT V. DELANEY, Assistant Clerk
of the Court.

THE PRESIDENT: This is an application on behalf of the prosecution under Rule 6(b)(1) pertaining to prosecution's documents 487, 1112, 2339, and 2611.

MR. LOGAN: We have no objection with respect to document 487.

The second item, document 1112, the word "Draft" should appear at the head of the title in that document. It is omitted in the excerpt prepared by the prosecution.

THE PRESIDENT: We direct it be inserted.

MR. LOGAN: 2339, no objection.

MR. BLEWETT: May I say a word, Mr. Logan?

MR. LOGAN: I am sorry.

MR. BLEWETT: It is certainly not part of General TOJO's speech, your Honor. It is editorial comment. There is no real objection to it. I call that to the attention of the prosecution so that the document, if tendered, would not be part of the speech. Here is the exhibit.

MR. LAVERGE: You mean the first part of it marked on page 200? It is only meant to show it is the particular speech on that occasion. We do not attach any particular importance to that comment, but to establish it was the part of the speech.

MR. BLEWETT: It says "part of TOJO's speech" in your application.

MR. LAVERGE: The first paragraph is only meant to prove that it is a speech before the 82nd Diet.

That is all we marked the first paragraph for.

MR. BLEWETT: That is all right.

THE PRESIDENT: Well, you are on No. 3, document 2339, Japan Year Book, 1943-1944. You ask for five excerpts. What about those, Mr. Logan?

MR. LOGAN: That is the one we are just talking about.

THE PRESIDENT: Oh, is it? I thought you were talking about No. 2. I am sorry.

MR. LOGAN: No, No. 2 was the one where we requested the word "draft" to be inserted. That has been done.

THE PRESIDENT: You have finished with 2339?

MR. LOGAN: Yes. 2611, that is a book by van Mook. The prosecution has gone through the entire book, taking out various excerpts. All we request is the first page of the book and the preface which constitutes about seven pages.

MR. LAVERGE: You mean the title page?

MR. LOGAN: Title page and the preface.

MR. BORGERHOFF-MUELDER: Yes, sir.

THE PRESIDENT: Any objection?

MR. BORGERHOFF: No.

THE PRESIDENT: We will grant that.

The second application is request for production of witnesses and documents by counsel for KIMURA, Heitaro.

MR. LOGAN: We had a little trouble with

transportation this morning, your Honor. Maybe KIMURA's counsel has not arrived yet.

MR. KEENAN: Mr. President, we have no copy of that. We do not know what the application is.

THE PRESIDENT: That will go to the bottom of the list.

The next application is an application for leave to have the evidence of Joseph W. Ballantine presented in a prepared statement. Is there any objection?

MR. LOGAN: Well, with respect to that, your Honor, you will recall that there were two previous applications which the prosecution made: one was with respect to John Liebert, and the other Admiral Richardson. We had the opportunity of examining beforehand the proposed statements both of those were to make. We have not seen this application. We do not know how long it is, or what they contain. In other words, there were special circumstances in regard to both of those applications which we do not believe appear in this particular case.

In the first place, this Mr. Ballantine, of course, is a well-educated man, and the matters that are set forth in the affidavit concerning which he is to testify are facts. I cannot see how he could be called upon to give expert opinion with any great length, and a number of documents are documents, I assume, which will be used in his testimony, and it is

so stated in the affidavit of Mr. Higgins. Those affidavits, I should imagine, could be processed separately and not made part of his statement necessarily.

There is also the difference that this testimony will not include any statistical matter such as was contained in Liebert's statements, but matters not of a technical nature. He is a high-ranking diplomat and should be able to handle himself, can do so very well under both direct and cross-examination.

Now in addition to that, of course, we have the objections that we voiced before, that where a witness who speaks English gives his direct testimony from prepared notes, we do not believe it is fair to the defense. In other words, a great deal of time and effort is spent in the preparation of a prepared statement and revisions are made, and, perhaps, re-revisions, which, of course, he would not have the opportunity to do if he was placed on the stand and answered questions directly. In other words, your Honor, we believe that this type of procedure places the prosecution and the defense on two separate footings: one where the prosecution is able to prepare a statement, prepare it well in advance. We have not that opportunity in our questions that we ask the witness on cross-examination. We have to frame our questions and take his answers as they are given.

THE PRESIDENT: You would have his statement a

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THE PRESIDENT: You would have his statement a

fortnight in advance.

MR. LOGAN: We appreciate that advantage to the defense, your Honor, but we think that the disadvantages of having him testify from a prepared statement far outweighs the advantage we would receive by having the statement a fortnight in advance.

THE PRESIDENT: Well, the reason for calling him is set out in paragraph 3 of Mr. Higgins' affidavit. He is to "testify in accurate detail as to numerous matters of correspondence and diplomatic conferences, including the chronological recital of diplomatic negotiation between the United States and Japan. His testimony will be largely documented and will include accurate and detailed references to documents and conferences and will be largely (although not entirely) a statement of an especially qualified expert in his profession."

Well, does not the reasoning we applied in the case of Liebert and Admiral Richardson apply here? That is, if he is examined in the ordinary way, he will every minute of the day be referring to documents.

MR. LOGAN: Well, that I would not know, your Honor, because I have not seen his statement.

MR. KEENAN: Mr. President, I would like to make an observation for a moment. The statement of defense counsel, for whom we have great respect, I think exhibits a misconception of the functions of this Tribunal;

and, if it pleases the Court, the complaint is actually made that it is unfair, or there is something wrong, about careful preparation with meticulous detail in presenting facts and evidence to the Court. That is what the objection amounts to. Of course, it goes without saying, that the function of this Court is to determine what the facts are so it may justly pronounce judgment. Now how can it be wrong in any sense to have the testimony, especially of a witness of this type, covering a long period of years, carefully prepared diplomatic documents where every single word is habitually weighed, to have much time and effort expended beforehand so that the exact truth and exact facts can be carefully and meticulously presented to the Court?

THE PRESIDENT: Of course, there is this answer to that, Mr. Chief Prosecutor --

MR. KEENAN: Just on this part, your Honor, I am anxious to hear what you have to say.

THE PRESIDENT: -- that no British or American criminal court would allow this affidavit to be used in this way, and this is a criminal court -- an international criminal court which is bound by a Charter which insists on expedition, which cuts out all the rules of evidence and the rules of procedure.

MR. KEENAN: I am just addressing myself, your Honor, for the time being, whether it is French, British, Russian, or if they never did have a court before,

that what is the function of a court? We are attempting here to place facts before a court. Now this witness is testifying as an expert, his position is consultant to the Secretary of State. He is a trained diplomat, and your Honor knows, and we all know, that in these diplomatic correspondences, these treaties, every single word is carefully weighed. There is not an instance I can think of where greater care is required.

Now if this witness goes on the stand as an ordinary witness, he will have to have constantly documents before him. He will have to read from them. It would be unfair to the Court, to himself, and to the defendants, that a single word in important correspondence of that nature be shaded. It could not be left to the memory of a person. It is not the type of testimony that can come to the witness' mouth.

THE PRESIDENT: I do not think anything would be gained by following the usual course of putting him on the stand and examining him in the usual way because, as I say, he would be referring to documents all of the time, and we would have the difficulties of translation --

MR. LOGAN: May I answer the Chief Prosecutor?

THE PRESIDENT: -- and the defense would not be disadvantaged in any way, as far as I can see.

MR. KEENAN: They will have the advantage of his entire statement. As to its being a disadvantage to them, counsel forgets that when a witness gets on the

stand in any case, produced either by prosecution or defense, when he is examined in chief, there is always the opportunity of his counsel to carefully go over every single word of his testimony, and the defense does not see him until when he gets on the stand. In this instance, it is vastly different and it is highly to their advantage, if they were seeking for advantage one way or the other in pulling and hauling in a court room.

MR. LOGAN: May I answer the Chief Prosecutor, if your Honor please? With respect to the first statement he made -- the very nature of Mr. Ballentine's testimony shows that he should go on the stand and testify from his own memory, and the fact that a statement is prepared in a case of this kind where, being a diplomat, his words are weighed and the various shades of meaning attached to words used by diplomats.

Now the prosecution is at a decided advantage if they sit down and carefully and calmly and coolly write out a statement, and assist Mr. Ballentine in this statement, and use words with a particular meaning, particular phraseology. That is something that is not obtained when a witness is put on the stand and asked questions.

THE PRESIDENT: Well, will Ballentine testify as to conversations he heard between Americans and Japanese in the diplomatic sphere?

MR. KEENAN: He certainly will.

THE PRESIDENT: Between, say, Mr. Hull and KURUSU and NOMURA?

MR. KEENAN: That is correct. There is no reason for not disclosing this, that memoranda prepared are prepared as promptly as possible. They do not do it during the conversations. It is not the custom because it restricts the liberty of statement back and forth if notes are taken at that time; but they are taken immediately afterwards, and they are so important that they form part of government archives and part of official records and are so recognized in our own courts.

THE PRESIDENT: He will stick to what he wrote down after the interviews, if he did any writing, then?

MR. KEENAN: Oh, yes. He would not attempt to go back six years in his memory, Mr. President.

Without attempting to be contentious, this is no memory contest. This is a fervent effort to give this Court the exact truth. Now could it not be much better done by referring to notes, and this is nothing but a man under oath carefully assembling and marshalling this carefully detailed history for the benefit of the Court learning what the facts were at the time. He is not going to rely upon his memory. He could not do it.

THE PRESIDENT: Now if he were asked, "What did Mr. Hull say to Admiral NIMURA?" he would say, "Well, I will have to refresh my memory. These are my notes,"

and he would just read them. It would amount to that.

MR. KEENAN: Exactly. If that procedure were followed with a witness like this, it would take four or five or six times as long to do it. It is time-saving, but it protects the defendants in a remarkable way. I think anyone who has ever tried a criminal case for the defendant would like to have the prepared statement of the chief witness two weeks in advance before he goes on and know what he is going to say.

THE PRESIDENT: Well, I can well understand the attitude of the defense in these matters because I know what happens in other criminal cases, and these things do not occur. Nevertheless, we have a Charter to guide us, and I do not think the defense would be prejudiced if this evidence is given on an affidavit or in prepared statement because I think the effect will be the same. The defense will be in no better position if the ordinary course is followed, and then we will have all the difficulties of translation and the loss of time involved in those difficulties. That is the way I view it, and that is the way many of my colleagues view it. We have given serious consideration to this. We are fully apprised of the departure involved in criminal proceedings.

MR. LOGAN: If this motion is granted, your Honor, may we have fourteen days instead of seven? Prosecution states at least seven days. May we have

at least fourteen?

THE PRESIDENT: Well, I think you should have a statement well in advance. I did suggest a fortnight.

MR. KEENAN: I think that is a little long, your Honor. Let's say ten days. I think that would be plenty.

THE PRESIDENT: Ten days, something over seven, ten days. The application is granted.

MR. KEENAN: Mr. President, I assume it is understood, and there will be no objection if there are a few preliminary questions as to his history and the like, also some additional ones that may come up, that there will be no objection to supplementation with oral questions.

THE PRESIDENT: Yes. Well, the application is granted under the term that at least ten days before Mr. Ballantine is called as a witness, the defense shall be tendered a copy of his prepared statement. The next application is a motion requiring the Legal Section of SCAP to turn out to the Clerk of this Tribunal the trial records in the YAMASHITA and HOMMA cases. I make that order.

MR. MANTZ: If your Honor please, that motion was already considered at the last conference and an order was entered. This is an application asking to withdraw that order and to vacate the original.

MR. KEENAN: Mr. President, the situation is very simple. The request was made for subpoena from

this Court to produce a record right here in Tokyo in possession of the Legal Section of SCAP. There is no requirement for any such subpoena. If you desire the records, we will bring it in ourselves. It was a mistake. It never should have been presented to this Court. We ask leave to withdraw it from the record.

THE PRESIDENT: Leave is granted accordingly. The early order is cancelled.

The next is this application for witnesses and documents, and is counsel for KIMURA here?

MR. LOGAN: No, he has not come. Can we put that over for several days, your Honor? I don't know anything about it myself.

THE PRESIDENT: Well, I will adjourn sine die, adjourn to a date to be fixed in this matter.

MR. HARDIN: Mr. President, there was an error made in entering orders the other day, 459 and 460. Mr. Logan has not seen them probably. 459 related to paper 422; 460 relates to paper 444, if I am not mistaken, Mr. Clerk. At any rate, the exhibit 58 is the Foreign Relations Book, exhibit 174 is the Hull testimony. The order relating to Foreign Relation's excerpts was entered as relating to 174 instead of 58. In other words, in the orders, 174 took the place of 58, and 58 took the place of 174. I ask that those two orders be rescinded and entered correctly.

THE PRESIDENT: Well, they are clerical or typographical errors. They are not judicial errors.

MR. HARDIN: Yes, sir. It is purely typographical. In other words, put 58 where 174 is, and in the other order put 174 where 58 is.

THE PRESIDENT: Well, make that order for corrections of the early order.

MR. HARDIN: Yes, sir.

(Whereupon, at 0922, the proceedings were adjourned sine die.)

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